UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

KEYSTONE AUTOMOTIVE INDUSTRIES, INC.,	)	
Employer,	)	
and	)	Case 32-RC-137319
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 853,	)	
Petitioner.	)	

EMPLOYER'S BRIEF IN SUPPORT OF EXCEPTIONS TO HEARING OFFICER'S REPORT AND RECOMMENDATIONS ON OBJECTIONS

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I. INTRODUCTION

Pursuant to Section 102.69(f) of the Board's Rules and Regulations, the Employer Keystone Automotive Industries, Inc. (Keystone or the Employer or the Company), by and through the undersigned counsel, submits this brief in support of its exceptions to the hearing officer's Report and Recommendations on Objections (Report) issued on September 3, 2015.

II. STATEMENT OF FACTS

A. Background

The Employer distributes automotive parts throughout the United States and Canada, including from its facilities in Union City and Stockton, California (Tr. 184, 1091).[1] The Union City facility primarily distributes "salvage" parts, which are original parts that have been removed from a damaged vehicle. The Stockton facility primarily distributes "aftermarket" parts, which are generic parts that are nearly identical to the original manufacturer's parts.[2] (Tr. 523, 1137.) Chavin Prum has been the General Manager of the Union City facility since September 2014 (Tr. 967, 1136-1137). Randi Graham has been the General Manager of the Stockton facility at issue in this case since January 2013 (Tr. 1463).

B. Representation Petition/Election

The Petitioner International Brotherhood of Teamsters, Local 853 (the Union), filed a petition to represent a unit of employees at the Employer's Union City and Stockton facilities on September 23, 2014. On October 7-8, 2014, a pre-election hearing (pre-election hearing) was held before a hearing officer at the Region 32 office in Oakland to take evidence on the appropriateness of the petitioned-for unit.

[1]Transcript and exhibit references in this brief are from the June 4-12, 2015 objections hearing.

[2]The Employer operates several facilities in Stockton; however, the Stockton facility at issue in this case only distributes aftermarket parts (Tr. 1463).

Following an unexplained delay of nearly four months, the Regional Director issued a Decision and Direction of Election (Direction of Election), directing that a manual ballot election be conducted on February 19, 2015,[3] among employees in the following unit:

> All full-time and regular part-time aftermarket delivery drivers, aftermarket shuttle drivers, salvage delivery drivers, route salespersons, and warehouse workers employed at the Employer's facilities located at 1627 Army Court, Stockton, California and at 30336 Whipple Road, Suite B, Union City, California, excluding all returns clerks, accounting COD clerks, inside sales coordinators, production technicians, salvage shuttle drivers, office clerical employees, managerial employees, professional employees, guards, and supervisors as defined in the Act.

The election was held on February 19 as directed. There were 57 eligible voters. The tally of ballots showed 21 votes in favor of, and 29 votes against, the Union. There was one void ballot and three challenged ballots, an insufficient number to affect the results of the election. (Bd. Exh. 1(b).)

C. Objections to Election

On February 27, the Union filed 19 objections to the election (Bd. Exh. 1(a)). On May 5, the Regional Director issued a Supplemental Decision on Objections and Notice of Hearing (Supplemental Decision), overruling Objections 2 and 8 in their entirety; overruling portions of Objections 1, 5, and 9; and ordering that a hearing be conducted on Objections 3, 4, 6, 7, 10, 11, 12, 13, 14, 15, 16, 17, 18, and 19, as well as the remaining portions of Objections 1, 5, and 9 (Bd. Exh. 1(b)).

On May 26, the Union filed with the Board a request for review of the Supplemental Decision with respect to the Regional Director's decision to overrule Objection 8 (Bd. Exh. 2). On June 4, the Board granted the Union's request for review, ordering that Objection 8 also be set for hearing (Bd. Exh. 3).

[3]All dates referenced herein are in 2015, unless otherwise stated.

D. Hearing Officer's Report

A hearing on the objections (objections hearing) was held on June 4-12 at the Region 32 office before Hearing Officer Janay M. Parnell. On September 3, the hearing officer issued her Report, in which she recommended that the Board overrule Objections 1, 3, 5, 7, 8, 10, 12, 13, 14, 15, 16, 17, 18, and 19, as well as portions of Objection 4. The hearing officer recommended that the Board sustain Objections 6, 9, and 11, and portions of Objection 4. The hearing officer also recommended that the February 19 election be set aside and a new election held.

E. Exceptions

The Employer's exceptions relate to the hearing officer's findings that, during the critical period prior to the election, the Employer promised employees wage increases (Objection 4), threatened employees with loss of benefits (Objections 6 and 11), and unlawfully interrogated employees (Objection 9). The Employer's exceptions also relate to the hearing officer's recommendation that the election be set aside as a result of those findings. Facts pertinent to the Employer's exceptions are set forth below.

1. Alleged Promise of Better Pay (Objection 4)

Objection 4 alleged, in pertinent part, that the Employer made promises of better pay if employees voted against the Union (Bd. Exh. 1(a)).[4] Evidence adduced at the hearing on this allegation focused on comments allegedly made by the Employer's Labor Relations Consultant Oliver Bell and Regional Vice President Randy Wittig, in connection with their discussing wage increases that employees at the Employer's Santa Fe Springs and Ontario, California facilities had

[4]Objection 4 also alleged that the Employer made promises of better benefits in the form of promotions if employees voted against the Union; however, the hearing officer correctly recognized that the Union presented nothing more than unsupported hearsay evidence in support of that allegation (Report 12-13).

received. Those discussions occurred during meetings with employees at the Union City and Stockton facilities on February 4 and 5. (Tr. 1089.)

a. Wage review process

The Company began evaluating wages for employees at its California locations in August 2014 (Tr. 1090-1092). The Company was not aware of any union organizing activity at that time (Tr. 1092). On September 23, 2014, before any decisions about increases were made, the Union filed the instant petition to represent employees at the Union City and Stockton facilities. Approximately one month later, the Union filed a petition to represent employees at the Employer's Santa Fe Springs facility. To avoid any appearance of improperly influencing the elections, the Employer decided to delay the wage review process at the Union City, Stockton, and Santa Fe Springs facilities until after the respective elections (Tr. 267).[5]

b. Santa Fe Springs election

An election was held at the Santa Fe Springs facility on December 18, 2014 (Tr. 1037). The employees voted 67-35 against representation by the Union. Approximately three-and-a-half weeks after the election, the Company moved forward with the wage review process at that location, and two weeks after that, employees received 12.45% raises (Tr. 1097-1098).

c. Rumors circulate

Soon after the Santa Fe Springs election, management representatives at both the Union City and Stockton facilities began receiving questions from employees about rumors they had reportedly been hearing. Wittig testified that employees told him they had heard he fired all of the pro-union employees in Santa Fe Springs and that the Company had lied to employees there about a raise in order to influence their vote.

[5]Nothing was alleged or found to be objectionable or unlawful with respect to the Employer's decision to delay the wage review process.

In addition to rumors about Santa Fe Springs, rumors were circulating that a former Stockton employee, Alonzo Blackman, had received a $2.00 to $2.50 an hour raise upon transferring to the Ontario facility. Stockton General Manager Randi Graham testified that this rumor prompted employees to ask questions about wage increases in Ontario. (Tr. 1508-1509.)

d. February 4 and 5 meetings

In order to address the inaccurate rumors and misinformation that were circulating, Wittig conducted meetings in the Stockton and Union City facilities between February 4 and 5 (Tr. 1100). In all the meetings, Wittig used the same PowerPoint presentation to convey the Company's message to employees (Tr. 1093; Emp. Exh. 10). Wittig followed the PowerPoint presentation verbatim in each of his meetings (Tr. 1095). Wittig specifically emphasized slide 13 of the presentation, which explained that sharing facts on the Ontario and Santa Fe Springs facilities was not a promise or prediction for Stockton or Union City (Tr. 1098-1099).

In addition to making it clear that the Company was not promising a wage increase by discussing facts related to Santa Fe Springs and Ontario, Wittig explained the process the Company had initiated to review wages in all its California facilities (Tr. 1090). In so doing, Wittig explained that the Company would follow the exact same process and procedure in Stockton and Union City once the union election was conducted regardless of the results (Emp. Exh. 10). Wittig never told employees in Union City or Stockton that Santa Fe Springs employees immediately received a pay increase after voting no (Tr. 1097).

Graham and District Manager Jerry Elwood confirmed Wittig's testimony regarding the wage review process and related communications to Union City and Stockton employees during the February 4 and 5 meetings (Tr. 987-997, 1508-1513).

e. Union witnesses

The Union went to great lengths to have its witnesses testify about direct promises that employees in Stockton and Union City would receive the same pay increases as Santa Fe Springs employees if they voted no. Despite finding many of them "unreliable" with respect to other objections about which they testified, the hearing officer curiously credited the Union witnesses' testimony on this single issue. The hearing officer found that Bell told employees during the meetings that there was a 12.5% increase given to employees in Santa Fe Springs after the union lost the election there, and that a "reasonable man" or "reasonable person" could assume that employees in Stockton and Union City would get the same result if they voted against the Union. (Report 11-12.)

The hearing officer also credited Union witnesses' testimony that Wittig made statements during the meetings to the effect that if the Union won the election, the raise process could take 6 months or 18 months to deal with, that it would be a long drawn-out process, and that there was a really big chance the employees would not get the raise or would end up losing money (Report 11-12).

2. Alleged Threatened Loss of Benefits (Objections 6 and 11)

Objections 6 and 11 alleged that, during the critical period, the Employer impliedly and/or actually threatened employees that they would lose benefits if they voted for the Union (Bd. Exh. 1(a)). The only evidence adduced at the hearing related to these objections involved allegations that (1) Acting Warehouse Supervisor Rolando Bellido told two employees around October 2014 that if the Union "infiltrated" the Company, there was a "good possibility" they would no longer

be offering the core bonus program;[6] and (2) Stockton General Manager Graham told employees the Company would no longer be lenient or flexible regarding issues related to time off to attend school activities or sports games if the Union was voted in.

a. Core bonus

The Union presented employee Terrell Ellis to testify about the core bonus allegation. On direct examination, Ellis testified that Bellido told him and "someone else" "in the beginning of the petition" that "there's a good possibility if the Union infiltrated the company that they would no longer be offering the core program" (Tr. 186).[7] Ellis could not recall who the "someone else" was (Tr. 187).

On cross-examination, Ellis testified that Bellido said, "[I]f the union infiltrated the company they'd more than likely take the core program away from the drivers anyway" (Tr. 281). He further testified on cross-examination that Bellido allegedly made this statement in October 2014 (Tr. 280). Ellis could not recall how they "got on the topic" of the core bonus, or any other context surrounding the conversation (Tr. 281).

Ellis testified that he told "other employees" what Bellido had allegedly said, but he never specifically identified anyone, nor did he ever identify when he allegedly told them (Tr. 187). Contrary to the hearing officer's finding of fact, Ellis did *not* testify that he told an employee named "Alfonso" about what Bellido had allegedly said (Report 18). Ellis merely testified that he heard "Alfonso" talking about possibly losing the core bonus.[8] Again, Ellis did *not* testify that he

[6]The core bonus program gives drivers a $1.00 bonus per bumper that they bring in from customers to be repaired and resold (Tr. 186, 1393).

[7]Ellis was not a driver at that time, so he was not even eligible for a core bonus. In August 2014, Ellis was transferred to a receiving floor position due to a collision for which he was at fault. He was not transferred back to a driver position until April 2015. (Tr. 138.)

[8]Ellis could not recall "Alfonso's" last name (Tr. 187).

told "Alfonso" what Bellido had allegedly said (Tr. 187). The Union offered no other witnesses to corroborate Ellis' testimony.

According to Bellido, Ellis approached him at some point after the petition was filed and asked "if there was going to be a bumper core program." Bellido testified that he responded, "I don't know. You're going to [have to] ask Randi [Graham] or one of the above managers because I really don't know what's going on with that." (Tr. 1392.) Bellido never told Ellis the Company would definitely not continue the core program if the Union came in (Tr. 1393).

b. Leniency

The Union presented Ellis and employee Max Cervantes to testify about Graham's alleged statement that the Company would no longer be lenient with certain practices if the Union were voted in. Ellis testified as follows with respect to what Graham allegedly told him:

> As far as the leniency, as far as employees being five, ten minutes late to work, and her being flexible with their schedules, so they could participate in their children's events and their own extracurricular events that didn't coincide with the schedules. Due to being under contract, it would have to be to the letter. And she would follow it to the letter.

(Tr. 276). Ellis could not recall when Graham allegedly said this, other than that it was before the vote, "possibly in the middle" between when the pre-election hearing occurred in October 2014 and the election occurred in February 2015 (Tr. 276). Ellis testified that approximately 10 employees were in the meeting (Tr. 286). He recalled that "possibly" employees named "Gabriella," "Harvey," and "Robert" were present (Tr. 285-286, 289).[9]

Cervantes initially testified as follows with respect to what Graham allegedly said to employees during a meeting about the Company being lenient if the Union were vote in: "[C]ertain perks we got, like coming in late or calling in or leaving to go pick up our . . . kid from school, that . . . we wouldn't get those little perks anymore. It would be straight business" (Tr. 44).

[9]Ellis could not recall any of these employees' last names (Tr. 157, 289).

Cervantes later clarified that Graham did not actually say what the specific perks were (Tr. 46). Cervantes could not recall the date of the meeting other than that it occurred soon after the petition was filed (Tr. 55-56). Cervantes recalled that only him, Ellis, Harvey Nelson, and Joe Campbell were present during the meeting (Tr. 121).

Graham and Bellido also testified about this allegation. Graham denied having any meeting or communications with employees when she said that employees may lose certain "perks" if the Union were voted in (Tr. 1469). Graham testified that, after the Union filed its petition, Ellis came to her office and wanted to talk to her about the Union and "what was going on" from his perspective. According to Graham, Ellis told her that the union activity was caused by prior management and that she should not take the activity personally. Ellis went on to explain his reasons for why he felt the Union was the best for him and his family. (Tr. 1573.)

Graham testified that, during this conversation, she and Ellis discussed the impact of a binding collective bargaining agreement. On that point, Graham told Ellis that if a contract went into effect, it could include rules on wages, benefits, and other terms of employment. Graham went on to explain that if those items were covered in a contract, the Company would have to follow the agreement. Graham stated that such a contract "could" take away some of the gray area that they currently have and make it "more black and white, due to the rules in the contract." (Tr. 1469.)

Bellido testified that he recalled Graham having a meeting with five to six employees when the issue of how a contract would impact employees came up (Tr. 1440). According to Bellido, Graham *never* told employees the Company could no longer be flexible with them if the Union were voted in, or words to that effect (Tr. 1411-1412). Consistent with Graham's recollection of the conversation with Ellis, Bellido recalled Graham simply explaining that if the Union came in

and a contract was negotiated, the Company would have to follow what was "inside the contract" (Tr. 1412).

3. Alleged Interrogation (Objection 9)

Objection 9 alleged that, during the critical period, the Employer coercively interrogated employees about their own, as well as their co-workers', support for the Union (Bd. Exh. 1(a)). The only evidence adduced at the hearing related to this objection involved allegations that employee Tolopa-Jo Faumuina and temporary worker Morgan Crowl were questioned about their union activities.

a. Faumuina

Faumuina testified that six different individuals conducted "ride-alongs" with him at various times during the critical period leading up to the election: Ontario Manager Carol Romero, Labor Relations Consultant Oliver Bell, Human Resources Director Bob Alberico, Union City General Manager Prum, Outside Sales Representative Don Harrison, and Project Manager "Joe," whose last name Faumuina could not recall.[10] Faumuina claimed that each of the individuals except "Joe" asked him how he felt about the Union. (Tr. 317-335.)

Faumuina initially testified that he simply talked with employee "Norman," whose last name he could not recall, "about" the ride-alongs (Tr. 320, 336, 377). In response to leading questions from the hearing officer, however, Faumuina testified that he told employee "Norman," as well as two other employees whose last names he could not recall—"Brandon" and "Eric"—"what was said" to him during the ride-alongs (Tr. 377). Faumuina never clarified what information he allegedly conveyed to Norman, Brandon, or Eric.

[10]The hearing officer appropriately found, with respect to Objection 8, that the Employer's ride-alongs were not objectionable (Report 24-29).

Employee Norman did not testify. Employee Brandon Marable testified, but did not specifically discuss what Faumuina allegedly conveyed to him about his ride-along. Employee Eric Stevens testified (over the Employer's hearsay objection) that Faumuina, "Norman," and employee "Gordon" told him "as soon as they came back off the route" "what was going on, what was said during the ride along" (Tr. 865). Stevens offered no additional details.

Faumuina testified that on each occasion he was asked about his feelings regarding the Union, he openly answered that he felt the union coming in would either benefit employees or that he thought it was a good thing (Tr. 330-335). Faumuina did not state or imply that he was coerced or threatened in any way by the alleged questioning.

b. Crowl

Crowl worked at the Union City facility as a temporary employee from October 27, 2014, to March 18, 2015. He was not part of the bargaining unit and was not eligible to vote in the election. (Tr. 463-464.) Crowl testified that in mid-January, General Manager Prum asked him to come to the computer room so the two could talk. Crowl claims Prum shut the door behind them. (Tr. 477-478, 540.) According to Crowl, Prum explained to him that the Company was in the middle of a union vote. Crowl testified that Prum then asked him how he felt about it, what he knew about it, if he knew anybody else who was talking about it at work, and who may have been the person who started it. (Tr. 478.) Crowl said that Prum then asked him if he would be willing to let him know "if these things were going on," to which Crowl claimed he responded to Prum that he was "very uncomfortable doing this" (Tr. 480).[11]

[11]Crowl's testimony that Prum asked him to inform him of Union activity relates to alleged spying, which is not part of the Union's objections and is outside the scope of the hearing that was set in the Supplemental Decision.

Crowl testified that he told "Mike," Vot Doung, and "Brandon" about the conversation he had with Prum (Tr. 482).[12] Crowl said that neither Mike nor Brandon told him they were going to change their opinion on the Union issue because of what Crowl allegedly told them (Tr. 542). Crowl did not testify about whether and, if so, how, Doung reacted to allegedly being told this.

Prum denied ever having a conversation with Crowl in the computer room, and he denied ever asking Crowl anything about the Union or who was supporting it (Tr. 1195).

III. LEGAL ANALYSIS

A. The Board Should Reject the Hearing Officer's Finding that the Employer Made Objectionable Promises of Wage Increases. (Exceptions 1-15, 45)[13]

The hearing officer's finding that the Employer engaged in objectionable conduct by impliedly promising employees that wage increases would be forthcoming if they voted against the Union is based on improperly credited testimony and a misapplication of Board law. Consequently, the Board should reject the hearing officer's recommendation on this portion of Objection 4.

1. The hearing officer should not have credited the Union's witnesses.

The hearing officer improperly credited the Union's witnesses about Bell's and Wittig's alleged objectionable promises. Credibility-based findings of a hearing officer are not dispositive when the testimony is inconsistent with "the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole." *Humes Electric, Inc.*, 263 NLRB 1238 (1982). Here, the hearing officer ignored these factors when crediting the Union's witnesses.

[12]Crowl did not know Mike's or Brandon's last names (Tr. 475, 482).
[13]Exceptions 1, 2, and 45 generally relate to all of the arguments raised in this brief.

The evidence is uncontradicted that when discussing the rumors and issues related to wage increases at Santa Fe Springs and Ontario, the Employer's representatives made it clear that the Employer "will evaluate Union City and Stockton—no matter what happens in the vote." (Emp. Exh. 10). The Employer went to great lengths to lawfully convey the appropriate message to employees, and the hearing officer even went so far as to find that "there was nothing inherently objectionable about the Employer communicating that fact to its employees" (Report 11). Despite this, and despite finding other portions of the Union's witnesses' testimony "unreliable," the hearing officer concluded that Bell and Wittig made statements implying that employees would receive wage increases if they voted against the Union.

The Union's witnesses were not consistent in their recollection of the February 4 and 5 meetings. For instance, there was no consensus as to how many employees attended the meetings during which the percentage of wage increases at other locations was discussed. In Stockton, for example, Cervantes testified that four or five employees were present (Tr. 119), while Ellis recalled 10 employees attending the meeting (Tr. 175). In Union City, Marable estimated as few as 10 employees and as many as 15 employees were present (Tr. 756-57), while Crowl testified 20 employees attended the meeting (Tr. 496). In both cases, one of the Union's witnesses testified that *twice* the number of employees were present at the same meeting.

Additionally, some Union witnesses recalled Bell referencing a 12.5% increase for the Santa Fe Springs employees, while others correctly recalled Bell referencing a 12.45% increase. And while Cervantes testified that Wittig said the employees in Santa Fe Springs "got a good raise" after the election (Tr. 43), no one else confirmed that, and Wittig and Bellido specifically denied that any such statement was made (Tr. 1101, 1394).

Such drastically different attendance numbers and recollections of information provided by the Union's witnesses on this issue highlights how improbable it is that their testimony was inherently probable or reasonable.

2. The hearing officer's finding that the alleged statements were objectionable is not supported by Board law.

Even accepting the hearing officer's credibility resolutions, the Board should reject her finding that the alleged statements were objectionable. Wittig's alleged statements that if the Union won, the wage review process could take "6 months or 18 months" to be dealt with, that it would be a "long drawn-out process," and that there was a "really big chance" that the employees would not get the raise or would end up losing money, are protected by Section 8(c) of the Act. It is well settled that, "absent threats or promise of benefits, an employer is entitled to explain the advantages and disadvantages of collective bargaining to its employees in an effort to convince them that they would be better off without a union." *Winkle Bus Co.*, 347 NLRB 1203, 1205 (2006) (citing *Langdale Forest Products Co.*, 335 NLRB 602 (2001)). That is precisely what Wittig was doing during the February 4 and 5 meetings.

In *Winkle Bus Co.*, 347 NLRB at 1204, the employer posted a newspaper article about an unrelated employer that was refusing to negotiate a contract with a newly unionized employee group because a majority of those employees had signed a petition saying they no longer wished to be represented by the union. According to the article, a union representative accused that employer of "dragging their feet" and wanted the employer to "come to the bargaining table and sign off on a 'fair contract.'" Id. at 1205. A manager of the employer who posted the article approached an employee who was reading it and rhetorically asked, "Do you want to wait for years for a raise like those people?" Id. The Board rejected the argument that the employer impliedly promised a quicker wage increase if employees voted against the union.

The Board in *Winkle* cited the well-established maxim that an employer is entitled to truthfully explain the advantages and disadvantages of unionization in its effort to convince employees they would be better off without a union. The employer in the case had not made a direct promise of a wage increase. Rather, the Board explained, the manager's comment "lawfully identified one of the possible consequences of unionization, i.e., that collective bargaining might have to run its course before employees received any raises." Id. According to the Board, "[The manager] did not state or imply that the Respondent would ensure its nonunion status through unlawful means, or that it would withhold raises that employees would otherwise receive in retaliation for their decision to choose union representation." Id. The Board concluded, "[The manager's] comment simply and accurately indicated that wage increases could be delayed because of the uncertainties of the collective-bargaining process." Id. at 1206.

Winkle and this case are easily distinguishable from *G&K Services, Inc.*, 357 NLRB No. 109 (2011), and *California Gas Transport, Inc.*, 347 NLRB 1314 (2006), which the hearing officer cites to support her conclusion.

In *G&K Services*, the Board found the employer made an objectionable comparison of benefits among its union and non-union facilities to employees days before a decertification election. The Board held it was objectionable because the employer drew a "direct parallel" between the benefits at its unionized and non-unionized operations; it directly told employees that the employees at another facility "voted to get rid of their union"; and it emphasized that, shortly thereafter, those employees received a benefit that was given to employees at other non-unionized facilities. What the employer did not tell the employees was that other unionized operations also had that particular benefit. This is very different from the facts presented in this case, where the alleged promise was not made days before an election, it did not involve a comparison of union

and non-union facilities, there was no reference to the other facility "getting rid" of their union, and Keystone did not withhold any material information about the comparison.

In *California Gas*, the Board found that the employer had made an implicit promise to grant benefits contingent on employees relinquishing support for a union. The employer in the case granted a 10-percent bonus at two facilities (San Diego and El Paso) after the union had filed its petition to represent employees at a third site. The employer was aware that the activity at its third site was started because employees wanted an improvement in wages. Once the union filed its petition at the third site, the employer told employees that it could not make any promises concerning wages and that "everything was on hold because of the election." The employer provided no further explanation.

After employees at the third facility learned that a 10-percent bonus had been paid at two other facilities where there was no union activity, they asked the employer about the possibility for such a bonus at the third site. The employer's representative responded to that question by saying, "What happened in Tijuana [San Diego] happened in Juarez [El Paso]." Based on those facts, the Board found that employees would reasonably interpret the employer's statements as having promised to grant a wage increase if they rejected the union. Significantly, the Board reached its conclusion in that case because the employer *did not* explain that the process for granting wage increases had been deferred until after the election and that the process would go forward *regardless of the outcome.*

In the instant case, Wittig made it clear throughout his presentation that the wage review and any subsequent increase would take place regardless of the outcome of the election. Although the Union's witnesses generally did not recall him making that clarification, the overwhelming weight of the evidence indicates that he did.

Bell's alleged comment that a "reasonable person" could assume that, if employees in Santa Fe Springs received a wage increase, employees in Union City and Stockton would receive the same increase, was also perfectly permissible. The hearing officer accepted that Bell replied to employee questions about a raise that "he was not promising that the employees were going to get the same dollar amount or that the same thing would happen in Stockton" (Report 8). How, then, could it be objectionable for Bell to tell employees that a "reasonable person" could assume the same process and same raise would take place in Union City and Stockton?

The hearing officer reads this alleged statement entirely out of context. Again, Bell repeatedly made clear, as did Wittig, that this was not a promise. Board law simply does not support the conclusion that Bell's alleged comment about a "reasonable person" was somehow unlawful.

B. The Board Should Reject the Hearing Officer's Finding that the Employer made Objectionable Threats of Loss of Benefits. (Exceptions 1-2, 16-28, 45)

The hearing officer's findings that Bellido told two employees around October 2014 that if the Union "infiltrated" the Company, there was a "good possibility" they would no longer be offering the core bonus program, and that Graham told employees the Company would no longer be lenient or flexible regarding issues related to time off to attend school activities or sports games if the Union was voted in, are not supported by the evidence. Even if there were evidentiary support, the hearing officer's legal conclusions are erroneous. Consequently, the Board should reject her recommendation to sustain Objections 6 and 11.

1. The evidence does not support the hearing officer's findings.

The Union presented only one witness, Terrell Ellis, to testify about Bellido's alleged "threat" that drivers would lose the core bonus if the Union were voted in. And Ellis *was not even a driver*. (Tr. 138.) Regardless, Ellis was extremely vague about what Bellido allegedly told him.

Ellis thought "someone else" was present during the conversation, but could not recall who it was. Moreover, Ellis testified that he told "other employees" about Bellido's alleged "threat," but he never identified who they were, or when he told them. (Tr. 187.) Contrary to the hearing officer's finding, Ellis did *not* testify that he told an employee named "Alfonso" about what Bellido had allegedly said (Report 18). The hearing officer's misreading of the record in this regard is an egregious error. Ellis only testified that he heard "Alfonso" talking about possibly losing the core bonus. For the hearing officer to conclude from this testimony that Bellido's alleged "threat" to Ellis was disseminated to other employees is simply wrong.

The hearing officer's conclusion that Graham threatened employees that the Company would be less lenient if the Union were elected is likewise premised on tenuous findings of fact. Ellis and one other employee, Max Cervantes, were the only witnesses the Union presented on this issue. Ellis could not recall when Graham allegedly made the statement or who else possibly heard it. (Tr. 285-286, 289.) Although he named several individuals by first name (because he could not recall their last names), no one else besides Cervantes was called to testify about the alleged statements.

For his part, Cervantes initially played fast and loose by describing the various perks that Graham allegedly said employees would lose, including calling in late or leaving early to pick up kids from school (Tr. 44). He later clarified, however, that Graham never actually provided those examples; rather, he inferred this is what she was talking about when she mentioned "perks" (Tr. 46). Like Ellis, Cervantes could not recall when the meeting occurred. And while he named several individuals who were allegedly in attendance, none was called to corroborate his testimony (Tr. 55-56, 121).

2. The hearing officer misapplied Board law.

Even if the hearing officer's findings of fact on this issue were supported by the record, she incorrectly applied Board law by surmising that employer predictions of adverse consequences arising from unionization are *not* protected by Section 8(c) of the Act (Report 19). An employer is absolutely permitted to explain to employees how things might be in the facility if a union were voted in. Indeed, that is the heart of Section 8(c), and the Board has consistently held as much. See, e.g., *Dish Network Corp.*, 358 NLRB No. 29, slip op. at 1 (2012) (employer may inform its employees that unionization will bring about a "change in the manner in which employer and employee deal with each other"); *International Baking Co.*, 348 NLRB 1133 (2006) (employer's explanation that it would be unable to be flexible with lateness policy if a disciplinary provision was included in a collective bargaining agreement, was not unlawful); *Ben Venue Laboratories*, 317 NLRB 900 (1995), enfd. 121 F.3d 709 (6th Cir. 1997) (employer's announcement that it would discontinue its open-door policy if employees voted to unionize not unlawful); *FGI Fibers*, 280 NLRB 473 (1986) (employer's statement that it would discontinue open door policy if union was voted in because it would be required to go through grievance and other union procedures not unlawful); *Tri-Cast, Inc.*, 274 NLRB 377 (1985) (employer's remark that his informal and "person-to-person" interaction would change in operations run "by the book," with a stranger, was not unlawful); *United Artist Theatre*, 277 NLRB 115 (1985) (employer's statement that employees would vote away their right to deal with management directly if they voted for the union not unlawful).

The hearing officer completely disregarded this well-established case law in reaching her conclusion that Bellido and Graham made objectionable "threats" in this case.

C. The Board Should Reject the Hearing Officer's Finding that the Employer Engaged in Objectionable Conduct by Interrogating Employees. (Exceptions 1-2, 29-45)

As with her finding regarding the alleged objectionable threats of loss of benefits, the hearing officer's finding that employees were objectionably interrogated is not supported by the evidence, and her legal conclusions are inconsistent with established Board law. Consequently, the Board should reject the hearing officer's recommendation to sustain Objection 9.

1. The hearing officer's findings of fact are not supported.

The hearing officer found that one employee, Faumuina, and one temporary worker, Crowl, were interrogated during the critical period. With respect to Faumuina, his testimony was so vague and exaggerated that it could not be reasonably accepted as fact. According to Faumuina, everyone who rode with him—except "Joe"—asked him how he felt about the Union. (Tr. 317-335.) Curiously, not a single other employee testified that they were similarly questioned by any of the employer's representatives during their respective ride-alongs.

Faumuina's testimony regarding who he allegedly told about the interrogation is also not consistent with what the hearing officer actually found. Contrary to the hearing officer's finding, Faumuina never actually testified as to what he allegedly told other employees about his ride-alongs. He simply testified that he told employees "Norman," "Brandon," and "Eric" "what was said." (Tr. 377). None of those employees confirmed Faumuina's testimony in that regard.

With respect to Crowl, his testimony is also inherently unreliable, given that he was recently terminated, and he was not even an employee eligible to vote in the election. It defies logic to believe that Prum would ask Crowl—a temporary worker—his thoughts on the Union. And as pointed out earlier, Crowl's testimony that Prum allegedly asked him to inform him of Union activity is not related to the allegation that he was objectionably interrogated. At best, it

suggests surveillance, but that was not part of the Union's objections. Thus, Crowl's testimony should have been dismissed for being unreliable and irrelevant to the matter.

2. The hearing officer's legal conclusions are flawed.

To the extent Faumuina and Crowl answered the alleged questions regarding their feelings on union activity truthfully, and the questions did not have any coercive or intimidating effect on them, the alleged interrogations are insufficient to establish objectionable conduct sufficient to overturn the election in this matter. See *Toma Metals, Inc.*, 342 NLRB 787 (2004) (supervisor asking employee "what's up with the rumor of the union I'm hearing" did not violate the Act); *Amcast Automotive of Indiana, Inc.*, 348 NLRB 836, 837 (2006) ("The Act does not make it illegal per se for employers to question employees about union activity."); *NLRB v. Champion Laboratories*, 99 F.3d 223 (7th Cir. 1996) (supervisor's query about who attended union meetings "clearly . . . did not intimidate" employee who "told the supervisor that the [union] meeting did not concern him").

D. The Hearing Officer Should Not Have Ordered a Second Election. (Exceptions 1-2, 45)

The hearing officer did not acknowledge, let alone apply, the Board's test for determining whether objectionable conduct interfered with employees' freedom of choice such that a new election should be held. Instead, the hearing officer stated, in a single conclusory sentence, that "there is sufficient evidence to establish that the Employer's conduct as set forth in Objections 4, 6, 9, and 11 reasonably tended to interfere with employee free choice" (Report 41). Had the hearing officer properly considered and applied the requisite factors, the only reasonable recommendation she could have made is that a new election is not warranted.

1. Standard for overturning an election

It is well settled that "[r]epresentation elections are not lightly set aside." *Safeway, Inc.*, 338 NLRB 525, 525 (2002) (quoting *NLRB v. Hood Furniture Mfg. Co.*, 941 F.2d 325, 328 (5th Cir. 1991)). Thus, "there is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees." Id. (quoting *Hood Furniture*, 941 F.2d at 328). Accordingly, "the burden of proof on parties seeking to have a Board-supervised election set aside is a 'heavy one.'" Id. (quoting *Harlan #4 Coal Co. v. NLRB*, 490 F.2d 117, 120 (6th Cir. 1974), cert. denied 416 U.S. 986 (1974)).

The standard for overturning an election in cases such as this one—where there are no unfair labor practice allegations or findings—is whether the misconduct, taken as a whole, had "the tendency to interfere with the employees' freedom of choice." *Cambridge Tool & Mfg. Co., Inc.*, 316 NLRB 716, 716 (1995). The Board in *Cambridge* outlined the following factors to be considered in determining whether a party's misconduct has the tendency to interfere with employees' freedom of choice:

> (1) the number of incidents;
> (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit;
> (3) the number of employees in the bargaining unit subjected to the misconduct;
> (4) the proximity of the misconduct to the election;
> (5) the degree to which the misconduct persists in the minds of the bargaining unit employees;
> (6) the extent of dissemination of the misconduct among the bargaining unit employees;
> (7) the effect, if any, of the misconduct by the opposing party to cancel out the effects of the original misconduct;
> (8) the closeness of the final vote;
> (9) the degree to which the misconduct can be attributed to the party.

Id. at 158 (citing *Avis Rent-a-Car*, 280 NLRB 580, 581 (1986)).

2. The hearing officer ignored most of the *Cambridge* factors.

The hearing officer failed to consider most of the *Cambridge* factors in this case. First, there were, at most, four objectionable incidents that occurred during *a nearly five month critical period* leading up to the election. This is hardly a significant number when viewed in context.

Second, even assuming the incidents occurred as the hearing officer concluded, they were by no means severe or egregious. The alleged objectionable conduct was all inferential. There were no direct promises, threats, or interrogations. The hearing officer found that employees *inferred* from Bell's and Wittig's alleged comments that they would soon receive a raise if they voted against the Union. Likewise, the hearing officer found that employees *inferred* they would lose the core bonus and the leniency previously afforded them by the Company if they voted against the Union. Finally, there was no evidence that anyone *directly* asked Faumuina or anyone else how they intended to vote.

Third, there were very few people who were actually subject to the alleged objectionable conduct. According to the Union's witnesses, at most there were between 4-10 employees at the alleged objectionable meeting in Stockton, and 20 employees at the alleged objectionable meeting in Union City. There were only two employees that allegedly heard Bellido threaten that the core bonus would be taken away, and only three employees that allegedly heard Graham testify about the Company being less lenient if the Union were voted in. Of course, only two witnesses actually testified about hearing Bellido and Graham. The alleged incidents were isolated, and not continuing events. Further, for the most part, it was employees who were decidedly pro-union that were allegedly exposed to the objectionable conduct. The Union could not identify a single pro-company employee who allegedly might have voted differently had the alleged objectionable conduct not occurred.

Fourth, the record does not reflect that any of the alleged objectionable conduct occurred sooner than two or three weeks before the election. The meetings were February 4 and 5 (Tr. 110). Bellido allegedly told employees about losing the core bonus program in October 2014 (Tr. 280). Graham allegedly told employees about the Company being less lenient sometime "in the middle" of the campaign (Tr. 276). Prum's ride-along with Faumuina allegedly occurred in December 2014 (Tr. 334). Crowl was allegedly interrogated by Prum in mid-January 2015 (Tr. 477-478).

Fifth, the hearing officer failed to consider the degree to which any of the alleged objectionable conduct persisted in the minds of the bargaining unit employees. Again, the Union only presented testimony that admittedly pro-union employees were subject to, and therefore, "affected" by, the alleged objectionable conduct.

Sixth, the hearing officer grossly exaggerated the extent to which the alleged objectionable conduct was disseminated to the bargaining unit employees. While the hearing officer found, for instance, that Ellis told other employees what Bellido allegedly said, that finding is contradicted by the record, which reflects only that another employee was talking about possibly losing the core bonus. (Tr. 187.) Likewise, Ellis and Cervantes only testified that three or four other employees heard Graham's alleged threat (Tr. 121, 285-286, 289). And Faumuina and Crowl only testified that they talked to two or three people about their respective interrogations (Tr. 377, 482).

Seventh, the hearing officer failed to properly take into account the overwhelming evidence that, even if implied promises of wage increases and threats of benefit losses were made, the effect of those statements was cancelled out by other statements made by the Employer. For example, even if Bell and Wittig made objectionable implied promises with respect to how the wage review process would take place after the vote, they clarified throughout the presentation that no promises were being made, and that the Employer would take the same steps regardless of whether the

Union was voted in or not. With respect to the alleged loss of the core bonus threat and the alleged threat of less leniency, Bellido and Graham, at most, said those events *could* occur, not that they *would* occur. Finally, the alleged interrogations occurred long before the election, and they were allegedly directed at an individual who openly supported the Union, and another who was not eligible to vote. Thus, the impact was minimal, at most.

Finally, the hearing officer failed to consider the final vote count in her analysis. Nearly 60% of the employees who voted in the election voted against representation. This was not a one- or two-vote victory. It is simply unreasonable to conclude that the alleged objectionable conduct, which occurred long before the election and affected very few eligible voters, most of whom were admittedly pro-union anyway, impacted such a disparate vote count.

Had the hearing officer recognized and correctly applied the *Cambridge* factors in her analysis, she would not have recommended that the election be set aside.

IV. CONCLUSION

For the reasons stated herein, the Board should reject the hearing officer's findings and recommendations to which the Employer's exceptions relate.

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ATTORNEYS FOR EMPLOYER

September 24, 2015

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

KEYSTONE AUTOMOTIVE INDUSTRIES, INC.,	)	
Employer,	)	
and	)	Case 32-RC-137319
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 853,	)	
Petitioner.	)	

CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2015, I e-filed the foregoing **EMPLOYER'S BRIEF IN SUPPORT OF EXCEPTIONS TO HEARING OFFICER'S REPORT AND RECOMMENDATIONS ON OBJECTIONS** using the Board's e-filing system and that it was served on counsel for the Union via email the same day.

/s/ Reyburn W. Lominack, III